

of the Atlantic City system and Amcell's operations in adjacent areas.^{286/} While no single factor was in and of itself decisionally significant, the Commission stated that when it examined the totality of the circumstances, it found a substantial and material question as to "[w]hether Amcell's status as a prospective purchaser of the system with an independent interest in it predominates over its ostensible role as a turnkey manager answerable to Thompson."^{287/}

104. Though it designated Thompson's application for hearing, the Commission "emphasize[d]"^{288/} that the questions raised by this case do not arise merely because the Atlantic City system is being operated pursuant to a turnkey arrangement.^{289/} Moreover, the Commission stated that it "[did] not discount the evidence proffered by Thompson tending to indicate that [he] retains control of the system."^{290/} Rather, the Commission wanted to explore the totality of the circumstances in the Thompson/Amcell relationship in a hearing to determine

^{286/} HDO at 7142-43.

^{287/} HDO at 7143.

^{288/} Id.

^{289/} In the cellular context, the test of control has never meant that a licensee must be physically present at its station and cannot delegate operational duties. See O'Neill at 2575 ¶ 26. Turnkey management arrangements are the accepted norm, and the Commission has extolled their virtue in a lottery regime where winners often lack direct cellular experience or marketing and technical expertise. See generally Madison. At the time that Thompson and Amcell entered into their Management Agreement, the Commission consistently upheld such agreements under the Intermountain criteria where, as here, there was a contractual delegation of authority which preserved the licensee's right to ultimate oversight and control, and the licensee had in fact exercised such rights. See, e.g., Millicom of Omaha, Inc., 3 FCC Rcd 3754 (Com. Car. Bur. 1987); Miller Communications, Inc., 3 FCC Rcd 6477 (1988); South Central Bell, 3 FCC Rcd 1044 (Mobile Serv. Div. 1988). See also Riley Dep. Tr. page 20, line 21 through page 21, line 5, page 24, lines 2-10 (characterizing the Thompson/Amcell management arrangement as consistent with the Commission's control policies).

^{290/} HDO at 7143.

whether the parties had at some point in their relationship impermissibly crossed the line established by Section 310(d) of the Communications Act.^{291/}

105. In assessing whether or not a hearing is still necessary in this case, the Presiding Judge must be able to warrant that Thompson has retained actual, and not merely some formalistic or theoretical, control.^{292/} It was this concern on the part of the Court which engendered remand and designation for hearing in the first instance.^{293/} Based on the comprehensive record developed through discovery, the Presiding Judge may properly conclude that the concerns of the Commission and the Court have been fully addressed and that a hearing is not warranted. The record demonstrates beyond a doubt that the Thompson/Amcell arrangement is well within the mainstream of arrangements that the Commission has found not only acceptable, but in the public interest. Moreover, an analysis of the facts under each of the Intermountain guidelines shows that Thompson has at all times remained the real-party-in-interest, retaining actual control of his application and of the Atlantic City system.

^{291/} 47 U.S.C. § 310(d).

^{292/} The Court, comparing the Atlantic City Order to La Star and other prior cases, expressed the concern that the Commission seemingly had departed from a test of actual control, transforming the Intermountain factors into a test of "legal" or theoretical control, without having announced a reasoned basis for its change in policy. TDS v. FCC at 50. The court directed the Commission to "bring its decision into compliance with agency precedent or explain the departure." Id.

^{293/} HDO at 7139-40.

B. Thompson Was The Real-Party-In-Interest Behind His Application

106. The principal thrust of the HDO is to determine if Thompson allowed Amcell to assume control of the Atlantic City system following the grant of a construction authorization.^{294/} The Commission expresses no concern with regard to the ownership or filing of Thompson's application. While the HDO does state that questions arise about the agreements Thompson executed with TDS and Amcell while he was an applicant, those questions pertain to the manner in which the Amcell agreements, in particular, were given effect following grant of Thompson's application.

107. Thompson alone bore the cost of his application. Moreover, neither Amcell nor TDS nor any other party had any interest in the application when it was filed.^{295/} After Thompson filed his application, consistent with Commission policy at the time,^{296/} prior to the lottery, he entered into the CMS Agreement with other applicants for the market.^{297/} When his application was selected in the lottery, each of the other signatories to the CMS Agreement became contractually entitled to a pro-rata share of 49.99% of the system. Under the CMS Agreement, Thompson was to retain a 50.01% interest, and was specifically required to maintain

^{294/} See supra part II ¶¶ 9-10.

^{295/} See supra part III ¶ 14.

^{296/} Jacksonville Cellular Telephone Corporation, 2 FCC Rcd 6416, 6418 (Mobile Serv. Div. 1988) (citing Public Notice, Report No. CL-87-205, released March 12, 1987) ("The Commission's rules permit cellular applicants to enter into agreements whereby the parties contract to grant to each other an irrevocable option to acquire up to a 0.99% share of the winning party's application [subject to the limitation that] the interest represented by the shares so distributed does not exceed 49.99%.").

^{297/} See supra part III ¶ 16.

control of the system. In fact, to this date, Thompson has yet to bring the minority interest holders into the licensee ownership structure and he continues to hold 100% of the stock of the licensee.^{298/} The CMS Agreement and the subsequent acquisition of minority interests by TDS and Amcell have been fully disclosed to the Commission,^{299/} and have had no effect upon Thompson's control over the prosecution of his application. The record is clear that notwithstanding provisions in the Indemnity Agreement, Thompson always had his own FCC and civil counsel and always determined the litigation path he would take on his own without interference from Amcell.^{300/}

108. Throughout the application phase, Thompson was solely responsible for all decisions contemplating the grant of his application and construction of the system. He had his own FCC counsel, Stuart Feldstein. Moreover, Feldstein and Thompson's business advisor, David Lokting, negotiated the Construction and Switching Agreement with Amcell. They did not simply accept the proposed Amcell agreement, but negotiated terms capping project costs and insuring system quality. Moreover, Thompson entered into the agreement over TDS's objection after careful consideration of the competitive implications of using switches of different vendors for the Atlantic City system.^{301/} The Commission explicitly recognized this application phase indicium of control by Thompson in the MSD Order, stating that "Thompson has indicated his independence by entering into [the Construction and Switching] agreement with Amcell" over

^{298/} See supra part III ¶¶ 16, 100.

^{299/} See supra part III ¶ 19.

^{300/} See supra part III ¶¶ 30, 90.

^{301/} See supra part III ¶¶ 23, 24, 28-32.

TDS's objections.^{302/} Furthermore, when Amcell petitioned the FCC to condition grant of his application upon abrogation of paragraph 16 of the Thompson/TDS Agreement, Thompson filed a separate petition asserting that he would accept a grant of the application with or without the deletion of paragraph 16.^{303/} In sum, the record shows that Thompson, and not Amcell, maintained full ownership and control of the winning application and was the real-party-in-interest.

C. Thompson Has Always Maintained Control of the Atlantic City System

1. Use of the Facilities

i. The Sharing of a Switch Does Not Affect Thompson's Actual Control of the System

109. The Commission, in its analysis of the first Intermountain factor, "unfettered use," questions whether the "technical compatibility and capacity to integrate the Atlantic City system and Amcell's own cellular operations [has] a potential impact on Thompson's unfettered use of the facilities."^{304/} The Commission's concern stems from language in an attachment to the Thompson/Amcell Construction and Switching Agreement which provided that Amcell would

^{302/} MSD Order at 3964.

^{303/} Ellis Thompson, Response to Petition for Conditional Grant, filed January 25, 1988.

^{304/} HDO at 7140.

ensure that the system was designed to be "automatically" part of the "wide area Delaware valley non-wireline cellular system":

The description indicates that technology used by the Amcell-related systems enables the Atlantic City system to be fully integrated with the other operations without additional hardware, software, or communications links. This circumstance might reflect valid technical and financial advantages for Thompson and be consistent with Thompson's retention of unfettered use. It is also possible, however, depending on the totality of the circumstances, that the arrangement might reflect an intent for Amcell to exercise control over an integrated operation contrary to Thompson's unfettered use of the facilities.^{305/}

110. Initially, it should be noted that the HDO erroneously suggests that Amcell owned the adjacent Philadelphia system in December of 1987 when the Construction and Switching Agreement was signed. In fact, Amcell did not acquire the Philadelphia system until 1992. It is clear that Thompson in no way intended the language in the Construction and Switching Agreement regarding the technical integration of his system through the use of common switching facilities to lessen his actual control over use of the Atlantic City system. Nor did it do so. Thompson entered into the agreement for two primary reasons. First, the Atlantic City system was a start-up operation. He was concerned about the significant expense of constructing a new system. By purchasing switching services from Amcell, Thompson was able to avoid the substantial capital expenditures and operating costs associated with owning a switch during the start-up years when he would be developing a customer base.^{306/} Second, Thompson wanted to ensure the compatibility of his system with the other non-wireline cellular systems in the region, which were Motorola-based. The goal was to allow for automatic hand-off between

^{305/} Id.

^{306/} See supra part III ¶ 31.

systems in order to compete effectively with the wireline system operated by Bell Atlantic whose geographic footprint extended beyond Atlantic City. By renting capacity from Amcell's Wilmington switch, Thompson was able to ensure his customers access to a seamless regional network of compatible systems. Otherwise, their calls would drop off at the market boundary.^{307/}

111. When Thompson and Amcell negotiated the Construction and Switching Agreement, Thompson wanted to ensure that the Atlantic City system achieved compatibility as part of the maximum construction cost guarantee offered by Amcell.^{308/} Accordingly, the "Outline System Configuration" attached as schedule A to the Construction and Switching Agreement specified that the system would be "automatically" part of the "wide area Delaware Valley non-wireline cellular system." In fact, no Delaware Valley regional system formally existed or exists. That phrase was simply a shorthand description of the competitive advantage sought by construction of an independent, yet compatible system. The Motorola "DMX" feature permitted inter-system roaming and customer validation among contiguous systems, including the Philadelphia system which was then owned by Metromedia.^{309/}

^{307/} See supra part III ¶¶ 30, 31.

^{308/} Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended). Section 1.8 of the Construction and Switching Agreement provides that "Amcell guarantees that the Budget . . . will not exceed \$1,250,000 to complete construction of the System in accordance with the Design." The "Design" is specified as "the final equipment design and configuration and specifications for the System based on the Outline System Configuration." Thus, the Outline System Configuration is tied directly into the guaranteed maximum cost for the system.

^{309/} See supra part III ¶ 30.

112. From a technical perspective, there is no loss of control over the operation of the system resulting from the sharing of a switch. The Atlantic City system has its own cell group manager physically interconnecting the system's cells to the switch. If it became necessary for any reason, Thompson could order the Atlantic City cell sites shut down without affecting operations of Amcell's Wilmington facility, much as he would have had to order his own personnel to shut down the Atlantic City cells if the system had a stand-alone switch within the market.^{310/}

113. A cellular systems is far more complex and sophisticated than the simple microwave systems which the Commission had in mind when it adopted Intermountain. Switches and cell sites are intricate, multi-million dollar facilities, surrounded by security fences and normally accessed only by authorized trained personnel.^{311/} Accordingly, the Intermountain guideline of "unfettered use" adopted 31 years ago in the context of a less sophisticated, "mom-and-pop" owner, stand-alone microwave system must be construed in light of "the current realities of cellular telephony."^{312/} The Commission has held that the Intermountain guidelines are sufficiently elastic to do so.^{313/} Recently, in the broadband PCS competitive bidding proceeding, the Commission reaffirmed the applicability of the Intermountain guidelines to all commercial mobile radio services, including cellular, stating that "[t]he six Intermountain factors provide reasonable benchmarks for ensuring retention of control by the licensee while allowing

^{310/} See supra part III ¶ 62.

^{311/} See supra part III ¶ 69.

^{312/} HDO at 7140 n.4.

^{313/} Id.

for full consideration of the circumstances in each case."^{314/} The Commission found that the guidelines were "sufficiently flexible . . . to ensure that [applicants] participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well."^{315/}

114. The type of system integration that exists in this case is typical of the cellular industry and does not impinge on Thompson's actual control of his system. At the time such decisions were made by Thompson, and as is the case today, it was not uncommon for smaller cellular systems to share the switch of an existing system in a neighboring market.^{316/} Indeed, the Commission acknowledges switch-sharing as an appropriate and accepted practice in the cellular industry, and Commission policy affirmatively encourages switch-sharing agreements.^{317/}

115. Thus, there is simply no evidence of "an intent for Amcell to exercise control over an integrated operation contrary to Thompson's unfettered use of the facilities."^{318/} Thompson entered into the Construction and Switching Agreement of his own free will for prudent financial

^{314/} Fifth Memorandum Opinion and Order, PP Docket 93-253, 10 FCC Rcd 403 (1994), ¶ 85 ("Fifth MO&O").

^{315/} Id.

^{316/} Riley Dep. Tr. page 13, lines 10-23.

^{317/} Madison at 5397 ¶ 2; Contel Cellular of Richmond, Inc., 3 FCC Rcd 3001 (Mobile Serv. Div. 1988) (approving an operating arrangement involving the sharing of a switch and consolidation of office facilities). See generally Corpus Christi Cellular Telephone Co., 64 RR 2d 1270, 1273 (Common Car. Bur. 1988) (regional cellular networks superior to "stand-alone" systems); Bill Welch, 65 RR 2d 755, 759-60 (1988) (not economically feasible to operate stand-alone systems because they cannot achieve the economies of scale of wide area systems).

^{318/} HDO at 7140.

and competitive reasons. The Commission has consistently found such arrangements to be in the public interest. Although the Atlantic City system is switched out of Amcell's Wilmington system, the record is clear that Thompson has never been, and never will be, denied access to the switch.^{319/}

ii. Thompson Has Unfettered Use of all Other Facilities and Equipment

116. The record clearly shows Thompson has "unfettered use" of the Atlantic City system, as that term has been construed and applied under outstanding precedents. In its analysis of the "unfettered use" Intermountain guideline, the Court of Appeals questioned "whether the Commission believes 'access' and 'use' to be equivalent."^{320/} The answer is clear: the Commission's cases have consistently held that a licensee's unimpeded access to his facilities satisfies the "use" criterion.^{321/} Thompson clearly has such access. ETC owns all the cellular transmitting antenna facilities.^{322/} Furthermore, ETC is the lessee for all of the cell sites and the local retail sales and installation center.^{323/} Moreover, ETC leases switch capacity from Amcell under terms that allow it to ensure that a minimum grade of service is provided to

^{319/} See supra part III ¶ 171.

^{320/} TDS v. FCC at 49.

^{321/} See O'Neill at 2575 ("[T]he controlling factor [under the first Intermountain factor] is that access is unimpaired.").

^{322/} Miller Communications, Inc., 3 FCC Rcd 6477, 6478 (Mobile Serv. Div. 1988) (licensee's ownership of cellular facilities establishes unfettered use thereof).

^{323/} See supra part III ¶ 68.

customers. Thus, Thompson has 365-day access to and use of the facilities and sites. No party can deny him such access, and the right of all other parties -- including Amcell -- to system access is derivative of Thompson's right as owner and lessee.

117. It is irrelevant that Thompson does not permanently reside in Atlantic City. As the Commission stated in O'Neill, "[w]hether the [licensee] does or does not have a private office [on-site] and keeps regular hours is immaterial. The controlling factor is that his access is unimpaired."^{324/} Over the years Thompson has, in fact, made regular inspection visits to the cell sites, the retail store just outside of Atlantic City and the Wilmington switch. His most recent visit to the system and the switch was during the last ETC quarterly meeting in March of this year.^{325/}

2. Day-to-Day Operations

i. **The Duration of the Management Agreement Does Not Undermine Thompson's Actual Control Over Day-to-Day Operations**

118. In the HDO, the Commission expresses two concerns relating to Thompson's control of daily operations. The first is that the Thompson/Amcell Management Agreement provides that Amcell will manage the system for 10 years with an option to extend the agreement

^{324/} O'Neill at 2575 ¶ 28.

^{325/} See supra part III ¶ 70.

for up to two additional five-year terms.^{326/} According to the Commission, this raises the issue that

while Thompson may have some theoretical right to terminate the agreement for violation of an implied covenant, there is no provision that gives Thompson routine discretion to review or terminate Amcell's management for as long as 20 years. This factor may undermine Thompson's ability to exercise control over day-to-day operations.^{327/}

119. While the duration of the Management Agreement might, if coupled with other circumstances, lead to a loss of licensee control, the record shows that in this case, it has not. As the Commission has noted, Amcell's performance under the agreement is subject to an implied covenant of good faith and fair dealing, as well as an obligation to perform its duties in a workmanlike manner.^{328/} Thus, Thompson has the right to terminate the contract should his continued oversight reveal poor performance by Amcell. The fact is, through the budget process, quarterly meetings, monthly and quarterly financial reports, the routine signing and approval of thousands of checks, and frequent telephone calls and correspondence, Thompson and Lokting are intimately involved in setting parameters for Amcell's performance and in reviewing Amcell's achievement of goals set by Thompson.^{329/} The record is clear that Thompson is very satisfied with Amcell's performance and has never wanted to terminate its services as system

^{326/} HDO at 7141.

^{327/} Id.

^{328/} See, e.g., Sutter v. Bingham Construction, Inc., 81 Or. App. 16, 724 P.2d 829 (1986); Board of Education v. Del Bianco and Associates, Inc., 57 Ill. App. 3d 302 (1st Dist. 1978).

^{329/} See supra part III ¶¶ 73-77.

manager.^{330/} It is also noteworthy that the term of the agreement, over the years Thompson has successfully negotiated significant reductions in the agreement's management fee, from 15% to 7.5%.^{331/} In any event, both parties have acknowledged that Thompson has the right to terminate the agreement at any time for cause.^{332/}

ii. The Sharing of Office Facilities and Personnel Is In the System's Best Interest and Does Not Affect Thompson's Ability to Control Its Day-to-Day Operations

120. The Commission's second concern under the daily control criterion is with regard to the system's sharing of office facilities and personnel with Amcell's Wilmington system. The Commission characterizes this arrangement as the "complete integration" of the two systems and questions whether it affects "Thompson's ability to exercise control of day-to-day operations, since Thompson presumably has no right to control [Amcell's] activities to the extent they relate to the integrated Wilmington system."^{333/}

121. The record demonstrates that, contrary to the suppositions of the HDO, the two systems are far from being "completely integrated." Thompson entered into the amendment to the Management Agreement consolidating the ministerial functions of system operation with Amcell's Wilmington system in order to achieve significant cost savings. Those savings have

^{330/} See supra part III ¶ 92.

^{331/} See supra part III ¶ 54.

^{332/} Thompson Dep. Tr. page 12, lines 2-7; Lokting Dep. Tr. page 96, lines 11-15; Hillman Dep. Tr. 17-19.

^{333/} HDO at 7141.

been estimated at over \$300,000 per year.³³⁴ Though certain facilities and personnel are shared, the Atlantic City system and the Wilmington system are operated as two wholly independent businesses.³³⁵ The two systems have separate marketing plans, rate structures, licensing agreements with Cellular One, cell site leases and bank accounts. ETC maintains its own retail sales and installation facility in a suburb of Atlantic City; contracts independently with its customers, vendors, and other cellular systems for roamer service; and owns all of the system's cellular equipment other than the switch.³³⁶

122. Moreover, the depositions of past and present Amcell employees show convincingly that Amcell's explicit corporate policy is that, as owner and licensee, Thompson is ultimately solely responsible for all decisions affecting the Atlantic City system.³³⁷ While Amcell can, and frequently does, make proposals that it believes will benefit the system, no change to system operations can be put into effect without Amcell first having obtained Thompson's approval.³³⁸ Amcell makes every effort to ensure that its employees understand the unique nature of the Amcell's involvement with the Atlantic City system. Similarly, Amcell takes pains to make it clear to third parties with whom the system does business that Thompson is the system's owner and Amcell is merely his managing agent.³³⁹

^{334/} See supra part III ¶ 61.

^{335/} Moerman Dep. Tr. page 12, line 4 through page 13, line 11.

^{336/} See supra part III ¶ 62.

^{337/} See supra part III ¶¶ 82-91.

^{338/} See supra part III ¶ 82.

^{339/} See supra part III ¶ 91.

iii. Thompson Maintains Actual Control Over the Day-to-Day Operations of the System

123. Thompson is fully in control of the daily operations of the Atlantic City system. While Amcell, as Thompson's management agent, is responsible for the routine administration of the system,^{340/} the parameters are set by Thompson. He reviews, revises, and ultimately must approve of every annual operating and capital budget.^{341/} Thompson and his counsel meet with Amcell management on a quarterly basis to assess the system's operations and to review policy.^{342/} In addition, Thompson, by himself and through Lokting, maintains regular contact with the senior members of Amcell's management team through regular telephone calls and correspondence, typically on a monthly basis, and more frequently if necessary.^{343/}

124. Moreover, numerous procedures are in place to ensure that Thompson's oversight, review and control of daily operations are fully effective. In 1989, for example, Thompson instituted a written policy restricting check-signing authority for the system. Pursuant to that

^{340/} Commission precedent acknowledges that turnkey management arrangements, by definition, are incompatible with constant hands-on involvement or micromanagement by a licensee and that a licensee may authorize a manager to perform the day-to-day functions of system operation. It is clear, for example, that an agent can even make "decisions pertaining to marketing, promoting, advertising, selling, billing, and collecting" for a licensee without raising a substantial question regarding control. South Central Bell, 3 FCC Rcd 1044, 1045 (Mobile Serv. Div. 1988). In fact, the Commission has recently stated that "whether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee." Fifth MO&O, ¶ 86.

^{341/} See supra part III ¶ 84.

^{342/} See supra part III ¶ 74.

^{343/} See supra part III ¶ 76.

policy, for any non-recurring expense over \$5,000, Thompson's signature had to appear on the check.^{344/} For certain specified categories of regularly recurring expenses, the policy provides that Thompson's signature is only required for checks in excess of \$25,000. Those categories included roamer payments to other systems, cell site leases, routine inventory purchases of cellular phones, and tax payments. In 1995, because of the business necessity of making rapid payments to agents, the policy was amended to allow Amcell to issue checks for agent commissions regardless of their amount, without Thompson's signature. However, such checks require a same-day telecopy notice to Thompson and a reference to the specific agent contract provision warranting such payment. All checks are issued within the parameters of the operating and capital budgets which Thompson helps to develop and must ultimately approve. As of the date of Amcell's document production in this hearing, Thompson had signed over 3,000 checks for the system.^{345/} The policy also provides that, regardless of amount, Thompson is to receive copies of all checks written for the system, along with accompanying invoices. This allows Thompson to review the system's expenditures and to verify their amounts.

125. In addition to checks issued for the system, Thompson reviews and signs all leases, equipment purchases, and contracts entered into by the system.^{346/} To effect this policy, whenever a document requires Thompson's approval, it is sent, along with a cover letter or routing slip, to Thompson's attorney for Thompson's review and execution.^{347/} Finally,

^{344/} See supra part III ¶¶ 77-78.

^{345/} See supra part III ¶¶ 77-79.

^{346/} See supra part III ¶¶ 56, 87.

^{347/} See supra part III ¶ 79.

Thompson also keeps abreast of daily operations through the receipt of reports from Amcell detailing the status of operations, including monthly and quarterly financial statements.^{348/}

126. Thompson's degree of actual control over his system's operations is demonstrated when his record of diligent oversight is contrasted with other licensee/management arrangements that the Commission has approved in the past. In O'Neill, for example, the Commission found that the control of daily operations Intermountain criterion was satisfied despite the licensee's admitted lack of hands-on involvement in daily operations. Despite his having "walked away" from the day-to-day control of his system, the Commission was satisfied by a provision in the management agreement that expressly stated that O'Neill retained control of such functions.^{349/} In the case of the Atlantic City system, not only did Thompson formally maintain oversight and control authority under the Management Agreement, he maintained actual control over the system's daily operations.

^{348/} See supra part III ¶ 73.

^{349/} O'Neill at 2575 ¶ 28. The Commission's conclusion that a transfer of control had taken place in O'Neill was the result of the manager's "pervasive and substantial involvement in [the licensee's] personnel and financial matters." TDS v. FCC at 49. There was no finding that O'Neill lacked control over daily operations.

3. Policy Decisions

i. **The Provisions of the Thompson/Amcell Indemnification Agreement Have Not Resulted In a Loss of Control Over Policy Decisions By Thompson**

127. With regard to the third Intermountain criterion, i.e. policy decisions, the Commission was troubled by the possible effect of a provision of the Thompson/Amcell Indemnity Agreement which "requires Thompson to 'cooperate[] fully' with Amcell and gives Amcell 'sole control' over the defense or settlement of any demand or claim subject to indemnification."^{350/} The Commission expresses the concern that the provision "raises the possibility of Amcell's dominance."^{351/}

128. The language quoted by the Commission, however, must be viewed in its limited context. The Indemnity Agreement was negotiated to protect Thompson, given the posture of his relations with TDS at the time, from any adverse consequences of entering into the Construction and Switching Agreement with Amcell.^{352/} To that end, it provides that Amcell will indemnify Thompson and ETC from

all claims, liabilities, obligations, suits, causes of action, administrative proceedings, losses, damages, costs and expenses arising from or relating to the execution and delivery of the [Construction and Switching] Agreement by

^{350/} HDO at 7141.

^{351/} Id.

^{352/} See supra part III ¶ 33.

Thompson and [ETC] or the filing by [Amcell] of any petition, request or other pleading or matter with the FCC.^{353/}

If Thompson chooses to invoke this indemnification protection, then Thompson would have to grant Amcell the right to defend such lawsuits.^{354/} Thus, Amcell only has a potential voice in litigation if Thompson seeks indemnification under the agreement.^{355/} Amcell has no control over any other litigation affecting the system and is not authorized to initiate a proceeding on its behalf. The narrow category of proceedings contemplated by the Indemnity Agreement in no way affects Thompson's control over policy decisions regarding the system.

129. Moreover, Amcell's control over such proceedings is explicitly limited by the following proviso in the Indemnity Agreement:

(i) [Amcell] shall keep Thompson . . . fully informed as to the status of such matter and shall furnish copies of all pleadings to [Thompson]; (ii) [Amcell] will have [no] power or authority to settle any such matter in a manner which will result in any liability to Thompson or [ETC] or which will infringe upon or impair any contract or other rights of Thompson or [ETC]; and (iii) Thompson's counsel will represent Thompson before the FCC.^{356/}

Thus, Thompson is able to protect his interests and the interests of the system even in those limited instances where the Indemnity Agreement potentially gives Amcell the authority to control litigation.

130. As a practical matter, Thompson has always made all decisions regarding his role in litigation completely independent of Amcell. He has always been represented by separate FCC

^{353/} Thompson/Amcell Indemnity Agreement § 1 (attached hereto as Exhibit 16).

^{354/} Lokting Dep. Tr. page 90, line 5 through page 91, line 12.

^{355/} Id. page 90, lines 16-17.

^{356/} Thompson/Amcell Indemnity Agreement § 1(c).

counsel in all proceedings before the Commission and has maintained separate representation in all civil litigation.^{357/} He has also taken different litigation positions from Amcell before the FCC.^{358/}

ii. Thompson Makes All Policy Decisions Affecting the Atlantic City System

131. The factual record in this proceeding demonstrates that Thompson has always had the final say on matters of policy. While Amcell is free to recommend courses of action or policies for the system, all such proposals require Thompson's approval before being put into effect.^{359/} Part of the expertise of a turnkey manager is in policy making, and Commission precedent makes clear that the adoption by the licensee of a manager's policy recommendations does not affect the licensee's control over his system. In O'Neill, the Commission stated approvingly that: "What policy changes that have been made . . . were specifically approved of and consented to by [the licensee]."^{360/} Here, the Management Agreement specifically provides

^{357/} See supra part III ¶ 90; Lokting Dep. Tr. page 90, line 9 through page 91, line 12, page 96, line 11 through page 97, line 18.

^{358/} See supra part IV ¶ 108.

^{359/} See supra part III ¶ 82.

^{360/} O'Neill at 2575 ¶ 28 (emphasis added). See also Hwalin Lee, 2 FCC Rcd 1561 (Mobile Serv. Div. 1987); Miller Communications, Inc. 2 FCC Rcd 6477 (Mobile Serv. Div. 1988).

that accounting, advertising and other functions performed by Amcell are "subject to the Licensee's continuing oversight and review."^{361/}

132. A recent example of Thompson's ultimate control over policy decisions is provided by the decision to change the Atlantic City system to AT&T switching equipment. After Amcell decided to replace the Motorola equipment in its Wilmington market, it presented Thompson with several options for the Atlantic City system, including the continued use of the Motorola equipment already in place. Only after reviewing the various alternatives and concluding that the AT&T equipment would best serve the system did Thompson authorize its use for Atlantic City.^{362/}

133. As the HDO expressly recognized, Thompson has always rejected Amcell's recommendations when he believes that they are not in the system's best interest:

We note in particular evidence that Mr. Thompson exercised control in specific matters. He states that he: (1) rejected a proposal by Amcell to sectorize two new cell sites to be constructed for the Atlantic City system; (2) personally, after his contract with Amcell, conducted discussions with TDS and its subsidiary regarding a reseller agreement and the purchase of resale customers; (3) rejected terms of a lease for the Atlantic City systems [sic] retail sales and installation center and negotiated the relevant construction contract; and (4) disapproved a major agency agreement until Amcell provided a cost analysis justifying the agreement. (citations omitted).^{363/}

134. Another significant way that Thompson exercises his control over policy is through his annual review and approval of the system's operating and capital budgets. He has the authority to object to items on a line-by-line basis. Thus, every capital expenditure for the system

^{361/} Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended), ¶ 4A.2.

^{362/} See supra part III ¶ 65.

^{363/} HDO at 7141.

receives Thompson's pre-approval.^{364/} Thompson does not automatically approve every budget proposal that Amcell places before him. In fact, Thompson has overruled the capital budget in every year of the system's operation, frequently demanding reductions of as much as sixty percent.^{365/}

135. Thompson also exerts his control over the system's policies by his requirement that he review and approve every contract that the system enters into, including roamer and hand-off agreements with other systems, the licensing agreement with Cellular One, cell site leases, vendor contracts, and agency agreements with third-party distributors.^{366/} For example, Thompson's review and approval was required before ETC joined the Industry Net Settlement Program which coordinates the payment of net roamer revenues. At the time, Amcell's markets had been members for a year and, based on their positive results, the Amcell management team recommended that ETC also join. Thompson reviewed the proposal, gave his approval and subsequently ETC joined the program.^{367/}

136. Thompson also must approve the rates and activation fees for the cellular services provided by the system. Thompson has actively exercised this authority from time to time to implement different pricing structures for the Atlantic City system.^{368/}

^{364/} See supra part III ¶ 84.

^{365/} See supra part III ¶ 85.

^{366/} See supra part III ¶ 87.

^{367/} See supra part III ¶ 64.

^{368/} See supra part III ¶ 86.

137. Thompson is responsible for all engineering decisions affecting the system.^{369/} As part of the capital budgeting process, Thompson has the authority to approve or reject new cell sites proposed by Amcell's engineering department.^{370/} In addition, any modification to the system, including the sectorization of cell sites, requires Thompson's express approval.^{371/}

138. Finally, Thompson is responsible for all FCC filings pertaining to the system. As system manager, Amcell forwards proposed or draft filings to ETC's independent FCC counsel (paid by ETC), who reviews and makes changes, requests and obtains Thompson's approval and signature, and files with the Commission.^{372/}

4. Personnel Responsibilities

i. **Thompson's Use of Amcell's Wilmington Office Personnel Has Not Diminished Thompson's Control Over Personnel Matters**

139. The Commission states that the sharing of personnel "between the Atlantic City and Wilmington systems raises questions as to whether personnel actions will be made on Thompson's -- not Amcell's -- behalf."^{373/} The record is clear that such "integration" no more

^{369/} See supra part III ¶ 82.

^{370/} See supra part III ¶ 84.

^{371/} See supra part III ¶ 88.

^{372/} See supra part III ¶ 89.

^{373/} HDO at 7141.

undermines Thompson's control over personnel actions than it does his control over daily operations. At the time that Thompson made the decision to consolidate the Atlantic City system with Amcell's Wilmington system, it was not unusual for the office operations and personnel of a cellular system to be consolidated with those of a system in an adjacent market.^{374/} Most of the applicants for cellular licenses during the time in question were either individuals or joint ventures formed for the purpose of applying for cellular licenses. Such applicants rarely had any employees.^{375/} Upon winning a cellular lottery, those applicants typically hired a management entity and used its employees in an effort to achieve efficiencies and economies of scale.^{376/}

140. Consistent with industry practice at the time, Thompson elected to operate the Atlantic City system through a management arrangement with Amcell. As is the case with turnkey management contracts generally, Amcell uses its own employees to perform its responsibilities under the Management Agreement. While Thompson could have retained Amcell only in the capacity of management consultant and staffed the system with personnel hired directly by ETC, such an arrangement would have been awkward and difficult to manage.^{377/}

141. After entering into the Management Agreement, Thompson determined that considerable cost savings could be achieved by consolidating the management of the Atlantic City system into Amcell's existing Wilmington facility.^{378/} The decision to do so -- affirmatively

^{374/} Riley Dep. Tr. page 13, line 24 through page 14, line 24, page 27, lines 4 through 15.

^{375/} Riley Dep. Tr. page 17, lines 2-4.

^{376/} Riley Dep. Tr. page 17, lines 5-8.

^{377/} See supra part III ¶ 92.

^{378/} See supra part III ¶ 61.

made by Thompson -- has saved the system an estimated \$300,000 per year in operating expenses and has in no way affected Thompson's control over the system.^{379/} Amcell's responsibility for personnel remains subject to the "oversight and review" requirements of the Management Agreement.^{380/} In effect, the Commission must view Amcell as Thompson's employee when analyzing his retention of control under the personnel factor. Otherwise, the Commission's approval of turnkey management arrangements, which typically include provision of all personnel by the manager, would be meaningless. This is yet another example of the need, as recognized by the Commission, to interpret the 31-year old Intermountain criteria in a manner which comports with "current realities of cellular telephony."³⁸¹

**ii. Through His Agreement With Amcell, Thompson
Maintains Actual Control Over System Personnel**

142. Because Thompson hired Amcell to manage the system, ETC has no need for employees other than Thompson. Thompson determines his own salary, which is paid by ETC, not Amcell.^{382/} Furthermore, ETC does retain directly the services of attorneys and other independent agents, as required. For example, Thompson selected, and pays as independent agents, his own attorney/business advisor and separate FCC counsel.^{383/} Moreover, Thompson

^{379/} See supra part III ¶ 61.

^{380/} See supra part III ¶ 73.

^{381/} HDO at 7140 n.4.

^{382/} See supra part III ¶ 101.

^{383/} See supra part III ¶ 90.